RANK XEROX (S) PTE. LTD.

v.

ULTRA MARKETING PTE. LTD.

COURT OF APPEAL, SINGAPORE
YONG PUNG HOW CJ
LAI KEW CHAI J
KHOO J
[CIVIL APPEAL NO. 38 OF 1988]
5 DECEMBER 1991

CIVIL PROCEDURE: *Appeal against summary judgment - Sum claimed less than $2,000 - Whether leave to appeal required - Failure to obtain leave - Is it a mere irregularity - Summary judgment - Final or interlocutory judgment.*

The appellant claimed against the respondent the sum of $1,706.17. Upon the appellant's application for summary judgment, the district Judge granted the respondent unconditional leave to defend. On appeal the judgment was varied. The respondent was given leave to defend conditional upon payment of $1,706.17 into Court. The appellant sought to have this order set aside.

Held:

[1] That an order for conditional leave to defend is an interlocutory order and leave is required to appeal.

[2] Failure to obtain leave is a matter that goes to jurisdiction and is not something that can be waived by the parties.

[Appeal dismissed with costs.]

Cases referred to:

Gordon v. Cradock [1964] 1 QB 503 ***(cit)***
Salaman v. Warner [1891] 1 QB 734 ***(cit)***
Bozson v. Altrincham UDC [1903] 1 KB 547 ***(cit)***
Ratnam v. Kumarasamy & Anor. [1962] 28 MLJ 330 ***(foll)***
Nagappa Rengasamy Pillai v. Lim Lee Chong [1968] 2 MLJ 91 ***(foll)***
Tee Than Song Construction Co. Ltd. v. Kwong Kum Sun Glass Merchant [1967] 2 MLJ 205 ***(cit)***
Haron Bin Mohd. Zaid v. Central Securities (Holding) Bhd. [1982] 2 MLJ 94 ***(cit)***
Knighthood Assurance Consultants Ltd. v. Meacher [1976] 120 Sol J 117 ***(not foll)***
White v. Branton [1984] QB 570 ***(foll)***

For the appellant - Yeo Hock Cheong; M/s. Hock Cheong & Co.
For the respondent - Yeo Piah Chuan; M/s. Piah Tan & Partners

JUDGMENT

Yong Pung How CJ:

The plaintiffs claimed against the defendants $1,706.17 for service and maintenance charges due under three agreements. Upon the plaintiffs' application for summary judgment, the district Judge granted the defendants unconditional leave to defend. On 31 March 1988 Chan Sek Keong JC, as he then was, varied this by giving the defendants leave to defend conditional upon his payment of $1,706.17 into Court. The plaintiffs sought to have this order set aside.

At the hearing before the Court of Appeal the defendants made a preliminary objection on the ground that leave to appeal had not been obtained as required under (i) s. 34(1)(a) of the Supreme Court of Judicature Act, since the value of the subject matter "at trial" was less than $2,000; or (ii) s. 34(2) of the same Act, since the order of conditional leave to defend was an interlocutory order. The plaintiffs contended that s. 34(1)(a) was inapplicable because, these being summary judgment proceedings, no "trial" was involved. In the event, we did not find it necessary to decide this point. We decided that an order for conditional leave to defend is an interlocutory order within the meaning of that subsection, and that leave is required.

We found the present English case law unhelpful in relation to the argument on s. 34(2) because in England and Wales there has been since 1925 an express statutory provision to the effect that an order refusing unconditional leave to defend an action shall not be deemed to be an interlocutory order. This was construed in *Gordon v. Cradock* [1964] 1 QB 503 to extend to an order giving conditional leave to defend. Our statutes and rules of Court do not contain any equivalent provision, nor is it proper to read into s. 34(2) of our Supreme Court of Judicature Act a meaning assigned by a special provision of a statute from another jurisdiction. We think this a desirable opportunity to state clearly what the position in this jurisdiction is.

Previously, there were two possible tests to be applied in deciding whether an order was interlocutory or final. The first was stated by Fry LJ in *Salaman v. Warner* [1891] 1 QB 734 at 736:

> ... an order is 'final' only where it is made upon an application or other proceeding which must, whether such application or proceeding fail or succeed, determine the action. Conversely, ... an order is 'interlocutory' where it cannot be affirmed that in either event the action will be determined.

The second was the test stated by Lord Alverstone in *Bozson v. Altrincham UDC* [1903] 1 KB 547 at 548. This test was as follows:

> Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then ... it ought to be treated as a final order; but if it does not, it is then ... an interlocutory order.

In *Ratnam v. Cumarasamy & Anor.* [1962] 28 MLJ 330 the Court of Appeal of the Federation of Malaya carefully considered the available authorities and held that the proper test to be applied in deciding whether an order was interlocutory or final ought to be Lord Alverstone's test in *Bozson's* case. The point was also discussed by the Federal Court in *Nagappa Rengasamy Pillai v. Lim Lee Chong* [1968] 2 MLJ 91. There, without adverting to any test, an order for conditional leave to defend was referred to as "manifestly an interlocutory order for the simple reason that it was not a final judgment".

So far as Courts in Singapore are concerned, the debate ended with *Tee Than Song Construction Co. Ltd. v. Kwong Kum Sun Glass Merchant* [1967] 2 MLJ 205, a decision of the Federal Court in Singapore, in which after due consideration of the authorities it was decided that Lord Alverstone's test should be adopted. It should be noted that in *Haron bin Mohd Zaid v. Central Securities (Holdings) Bhd.* [l982] 2 MLJ 94, the Privy Council, while expressing its reluctance to overrule the domestic Courts of common law jurisdictions outside the United Kingdom in matters of procedure as distinct from substantive law, went on to approve the application of the *Bozson* test in Malaysia.

Counsel for the plaintiffs contended that the reasons for the decision in *Nagappa Rengasamy Pillai v. Lim Lee Chong* were not clearly stated in that case and that the Federal Court had not applied Lord Alverstone's test in coming to the conclusion that an order for conditional leave to defend an action was an interlocutory order. Whether or not we concur with this submission does not affect our final decision because we should have agreed with the result in that case in any event: applying Lord Alverstone's test still leads us inexorably to the conclusion that an order for conditional leave to defend an action must be an interlocutory order. Counsel for the plaintiffs also contended that an order for conditional leave to defend is a final order in that it finally states the rights of the parties thus: the defendant can only defend if he satisfies the condition attached to the order granting leave; otherwise the plaintiff is entitled to judgment. This argument appeared to us to be fallacious.

In our judgment the phrase "the rights of the parties" contained in the *Bozson* test refers to the substantive rights in dispute in the particular action in which the application for summary judgment is made. When conditional leave to defend the action is given, then so long as the defendant complies with the condition, he has a right to a full trial on the merits, at which later time the substantive rights of the parties will be determined. All that the order for conditional leave decides is the condition subject to which the dispute on the substantive rights is allowed to proceed to trial. It does not decide any part of the substantive rights themselves.

The plaintiffs' Counsel then argued that if leave was necessary, failure to obtain it was a mere irregularity and did not nullify the appeal. He relied on *Knighthood Assurance Consultants Ltd. v. Meacher* [1976] 120 Sol J 117, and submitted that the defendants had waived the irregularity in not having taken any step to set aside the notice of appeal, filed more than 3 years ago.

We were not persuaded that the *Meacher* case should be accepted. We would rather share the view of the Court of Appeal, expressed *obiter*, in *White v. Brunton* [1984] QB 570 that failure to obtain leave is a matter that goes to jurisdiction, and is not something that can be waived by the parties.

Finally, the plaintiffs' Counsel applied to us for leave to appeal in the event we held that leave was required. There is no doubt that this Court has the discretion under s. 34(2) of the Supreme Court of Judicature Act to grant such leave. We did not, however, consider it appropriate to exercise this discretion in the plaintiffs' favour. The order appealed from was on any view plainly an interlocutory order, for reasons we have stated above. It was not a borderline case where the appellant's advisers could have reasonably or understandably taken a view which turned out to be wrong.

Plaintiffs' Counsel told us that leave had not been applied for because there was no Singapore case which had held that an order of the kind in question was an interlocutory order, although he conceded that the Malaysian Federal Court case of *Nagappa Rengasamy Pillai*, referred to above was precisely on point. We considered the plaintiffs' Counsel's explanation quite inadequate.

In the event, we dismissed the appeal without hearing the substantial grounds of appeal, and awarded costs against the plaintiffs.

Also found at [1992] 1 CLJ 557